

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

TEAM TIRES PLUS, LTD., a
Minnesota corporation,

03 MAR 14 PM 4:09

Plaintiff,

vs.

CASE NO.: CIV-01-1124 YME/RLP

JP

TIRES PLUS INC., a
New Mexico corporation,

Defendant.

**DEFENDANT TIRES PLUS INC.'S DAUBERT MOTION IN LIMINE TO
EXCLUDE THE TESTIMONY AND REPORTS OF PLAINTIFF'S DAMAGES EXPERT
STEVEN S. OSCHER AND SUPPORTING MEMORANDUM**

Pursuant to the Federal Rules of Evidence and the holdings of Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), Defendant Tires Plus Inc. ("Defendant") moves the Court to enter an order excluding the testimony and report of Plaintiff's expert Steven S. Oscher on the grounds that (1) Mr. Oscher's opinions are based upon unjustified assumptions, and (2) the prejudice which will be suffered by Defendant should Mr. Oscher be allowed to testify substantially outweighs any probative value.¹

I. Statement of Undisputed Facts ("SOF").

1. In August of 2002, Plaintiff had served upon Defendant a report from Steven S. Oscher ("Oscher Report"), the relevant portions of which are attached as Ex. 37. On page three

¹ Defendant has filed a Second Motion for Summary Judgment Against Plaintiff's Damages Claims. Should that motion be granted, Defendant's current motion would not need to be decided as any need for expert testimony relating to damages would not be required.

of that report, Mr. Oscher states that, based on Plaintiff's belief that it has been economically damaged as a result of Defendant's use of the mark TIRES PLUS, he was "engaged by counsel for the plaintiff to calculate the economic loss" resulting from that damage.

2. The Oscher Report sets forth three elements of damages, (1) Defendant's Profits. (2) Plaintiff's Economic Damages. and (3) Corrective advertising. Id. at 4.
3. According to Defendant's financial information, it has suffered losses of \$1,222,762 over a sixteen-year period. (Expert Witness Report of Bruce F. Malott ("Malott Expert Report") at 3, attached to Pl.'s Mot. Exclude Test. and Report of Expert Witness Bruce F. Malott.)
4. Instead of using Defendant's actual profits numbers, Mr. Oscher relied on a published study as a "benchmark for [Defendant's] specific financial information." Oscher Report at 4.
5. From this published study, Mr. Oscher determined that, nationwide, an average tire dealer had an operating profit of 3.3%, which, when multiplied by Defendant's net sales, amounted to profits of \$560,000 from 1994 to 2001. Id.
6. In calculating Plaintiff's economic damages, Mr. Oscher included the following: 1) an initial franchise fee; 2) royalty fees; 3) maintenance/license fees; and 4) inventory markup damages. Id.
7. Plaintiff has no plans to enter the New Mexico market (Hyduke Dep. at 93, attached to Def.'s First Mot. Partial Summ. J. Strike Count II Pl.'s Compl. as Ex. 7.)
8. Plaintiff has not encountered any actual confusion. (Pl.'s Mot. Summ. J. at 18.)

9. As of 1994, eight years after Defendant began using the mark, Plaintiff's closest company or franchise store was in Des Moines, Iowa. (Gullett Dep. at 137, ll. 21-24, attached to Def.'s First Partial Motion Summ. J. Strike Count II Pl.'s Compl. as Ex. 9.)
10. The initial franchise fee and royalty fees were calculated assuming Defendant would have purchased a franchise from Plaintiff in 1994. Oscher Dep. at 101, ll. 11-22 the relevant portions attached as Ex. 38.
11. The inventory markup damages were calculated by assuming Defendant would have bought 62.8% of its tires from Plaintiff. Id. at 92, l. 24 – 93, l. 3.
12. Franchisees of Plaintiff are not required to purchase tires from Plaintiff. Id. at 81, l. 21-82, l. 1.
13. Mr. Oscher has not stated any amount of money that would be needed to conduct corrective advertising, and has stated that he has no opinion about what such an amount would be. Oscher Report at 4; Oscher Dep. at 118, l. 18-21.
14. On November 18, 2002, Plaintiff had served on Defendant a rebuttal report prepared by Mr. Oscher to evaluate the conclusions of Defendant's expert Bruce Malott's report ("Oscher Rebuttal"), the relevant portions attached as Exhibit 39.

II. Standards

The testimony and reports of Mr. Oscher do not satisfy the standards set out in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Under Daubert, the Supreme Court established a framework that courts were to use to

analyze the admissibility of scientific expert testimony under Fed. R. Evid. 702. The principal purpose of the Daubert framework is to determine whether the proffered evidence is reliable. See United States v. Call, 129 F.3d 1402, 1404 (10th Cir. 1997). Under Daubert, courts are to consider five factors: (1) whether the technique used can and has been tested; (2) whether the technique has been subjected to peer review; (3) the known or potential error rate of the technique; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the technique has gained general acceptance in the scientific community. Daubert, 509 U.S. at 593-95. This list is not exhaustive. Id. at 594.

In Kumho, the Supreme Court reaffirmed the Daubert principles and held that the Daubert framework was to apply to all expert testimony. Specifically, the Court held that "Daubert's general holding - setting forth the trial judge's general 'gate keeping' obligation - applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." 526 U.S. at 141.

Under Rule 702, the trial court must act as a gatekeeper and determine at the outset, pursuant to Rule 104(a),

whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert, 509 U.S. at 592-93 (footnote omitted). In addition "[u]nder Daubert, 'any step that renders the analysis unreliable . . . renders that expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies this methodology.'" Mitchell v. Gencorp, Inc., 165 F.3d 778, 782 (10th Cir. 1999) (citing In re Paoli

R.R. Yard PCB Litigation, 35 F.3d 717, 745 (3d Cir. 1994)).

III. Mr. Oscher's Opinions Are Unreliable As Being Based On Unfounded Assumptions

Courts have repeatedly excluded expert testimony related to damages when the proffered opinions are based on unjustified assumptions. See First Savings Bank, F.S.B. v. U.S. Bancorp. 117 F. Supp. 2d 1078, 1087 (D. Kan. 2000) (citing Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 415-16 (7th Cir. 1992) (expert should have separated injury due to unlawful conduct from that due to new entry in market); Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 911 (2d Cir. 1962) (economist's damage evidence properly excluded where no basis for assumption established); Cochrane v. Schneider Nat'l. Carriers, Inc., 980 F. Supp. 374 (D. Kan. 1997) (excluding expert estimates of loss based on unjustified assumptions); In re Aluminum Phosphide Antitrust Litigation. 893 F.Supp. 1497, 1507 (D.Kan.1995) (proposed expert opinions based on unjustified assumptions would not assist the trier of fact and were therefore inadmissible under rule 702 & and cases cited therein); S. Pac. Communications Co. v. Am. Tel. & Tel. Co., 556 F. Supp. 825, 1075-76 (D.D.C. 1982) (damage model based on unreasonable and speculative assumptions not sufficient to support just and reasonable approximation of damages) aff'd, 740 F. 2d 980 (D.C. Cir. 1984)). In the present case, not only are Mr. Oscher's opinions based on unjustified and arbitrary assumptions, but these opinions are clearly contradictory to any actual data produced thus far. In particular, Mr. Oscher disregarded Defendant's financial information when calculating Defendant's profits. SOF No. 4. Additionally, Mr. Oscher assumed that Defendant would have accepted a franchise from Plaintiff in 1994 when calculating Plaintiff's "economic losses." Id. No. 10. Finally, with regard to

inventory markup, Mr. Oscher arbitrarily assumed that not only would Defendant have accepted a franchise from Plaintiff in 1994, but would have also purchased 62.8% of its tires from Plaintiff. Id. No. 11. These opinions must be excluded under the standards for expert economic testimony that is well accepted within the courts of the Tenth Circuit.

A. Defendant's Profits

Assuming that Defendant's profits are a proper measure of damages in this case, the amount of Defendant's profits calculated by Mr. Oscher are so speculative and contrary to actual data available to Plaintiff, that any opinion derived from such numbers must be excluded.

Defendant's business is not a profitable business, suffering losses amounting to well over \$1,000,000 in the past sixteen years. SOF No. 3. Therefore, the question of whether or not Plaintiff is entitled to recover Defendant's profits is moot as Defendant has none. Nevertheless, Mr. Oscher has asserted that Plaintiff is entitled to \$560,000 for what he refers to as "Defendant's Profits." Oscher Report at 4. Instead of relying on Defendant's financial data, or at the least, undertaking an analysis of Defendant's financial data, Mr. Oscher summarily ignored any actual figures. Instead of undertaking any analysis of this data, Mr. Oscher derived what he stated to be an "appropriate operating profit percentage" of 3.3% from a published study referred to as RMA Annual Statement Studies. Oscher Report at 4. These annual studies are published by Risk Management Associates (RMA) and contain financial information submitted to cooperating banks by companies grouped by industry "Standard Industrial Classification." Addendum to Expert Witness Report of Bruce F. Malott, CPA ("Malott Addendum") at 4, the relevant portions attached as Ex. 41.

This 3.3% profit number has absolutely no relationship to Defendant's tire stores and was

derived by Mr. Oscher without any reference to Defendant's own financial data. Were Mr. Oscher's derivation of a profit percentage based on a review of Defendant's financial data, all of which have been made available to Plaintiff, any objections as to Mr. Oscher's opinions could quite possibly be a question of weight and not admissibility. However, Mr. Oscher did not and has not availed himself of this data even though he admitted that Defendant's financial data would be the best evidence of Defendant's profit if a jury were to find the data to be properly recorded. Oscher Dep. at 44, l. 11 – 45, l. 8. Mr. Oscher even went so far as to say that specific financial information would always be the primary source for determining profits. Id. at 37 ll. 4-8. Even after being supplied a multitude of various financial documents relating specifically to Defendant's business, along with the personal tax returns of Don Leonard, owner of Defendant, Mr. Oscher remains unwilling to address these numbers, even though he admitted that he could not testify one way or the other whether or not Defendant's financial information was inaccurate. Second Oscher Dep. at 106, ll. 18-22, the relevant portions are attached as Ex. 40.

Mr. Oscher must not be allowed to substitute nationwide, generalized data bases for actual financial data, not one number of which has ever been shown to be related to Defendant's business. Furthermore, the database utilized by Mr. Oscher was never intended to be used in the context that Mr. Oscher used it. The court need look no farther than Mr. Oscher's own statements in order to judge the propriety of substituting this generalized data in lieu of analyzing Defendant's actual financial data.

Q. Are you aware of any concerns that RMA itself has expressed about the use of its data?

A. Well, they make a statement that it is not to be used because they're not giving any reliance to it.

The fact that RMA has put out these published studies, it is commonly used in terms of just doing what I'm doing and setting a benchmark. Nobody is saying that this is the way it actually is. It's just trying to give the user of

information the ability to see what the industry may or may not be doing.

Q. Right. It's just a general guideline, if you will?

A. Oh, absolutely.

Q. It certainly is not meant to be a specific accounting of what Don Leonard made or did not make in his business?

A. No, it couldn't be that. It's just to give me, as a provider of what I think is reasonable information, a benchmark, and that's how I've used it.

...
Q. Would it be fair to state that you can't take the RMA data and conclude that, because another -- an individual business is different, had different profit or loss, that they're necessarily not reporting their profit and loss accurately?

A. I don't know that I understand what you just asked me.

Q. You're not saying that you can use the RMA data and compare it to an individual business, such as Mr. Leonard's, and come to the conclusion that the reports of Mr. Leonard are inaccurate?

In other words, RMA might give you a conclusion that there's, across the board, a three-percent profit. That doesn't mean, if Mr. Leonard reports a loss, that his reports are not accurate?

A. Your last statement is a true statement. Your other question, the answer to it is: I don't know.

Oscher Dep. at 39 l. 6 – 41 l. 5.

First, this 3.3% number was not used as a "benchmark" as Mr. Oscher states. A benchmark is something to which actual numbers can be compared. But, instead of comparing Defendant's financial data with this data, Mr. Oscher simply assumed that Defendant did, in fact, attain this level of profitability. This assumption is clearly erroneous.

Second, RMA, which publishes the numbers utilized by Mr. Oscher, recognizes that its studies should not be considered the norm in a given industry when it states in the introduction to its studies:

RMA does not recommend the Statement Studies figures be considered as absolute norms for a given industry. Rather the figures should be used only as general guidelines and in addition to the other methods of financial analysis.

RMA, Annual Statement Studies, 2000-2001 at 12, attached as Ex. 42.

Mr. Oscher, however, with regard to calculating the amount of Defendant's profits, did not use any other financial analysis, but simply derived a profit percentage from the RMA studies and multiplied Defendant's net sales by that number.

Furthermore, the totality of the conclusions in Mr. Oscher's rebuttal report are that "it remains difficult to conclude that [Defendant] operated unprofitably for fourteen of the prior sixteen years." Oscher Rebuttal at 4. When asked in his second deposition if he could opine on whether Defendants financial information was accurate, he agreed that he could not testify to such an issue. Second Oscher Dep. at 106, ll. 18-22. Aside from the statement quoted above, Mr. Oscher does not give any further opinions about Defendant's actual financial data. Because no opinions are given in this rebuttal report, this report and any future opinions based thereon should also be excluded from this case.

The real reason Mr. Oscher utilized a published study to calculate Defendant's profit instead of Defendant's actual data is clear: Plaintiff could not recover any damages in the form of Defendant's actual profits because Defendant has none. Therefore, Plaintiff chose to disregard Defendant's actual data and proceeded to make a second assumption that Defendant must have actually made a profit of 3.3%. Plaintiff and its expert, Mr. Oscher, must not be allowed to invent hypothetical profit percentages for Defendant when the actual figures are readily available. Mr. Oscher's opinions do not even qualify as speculation as they are clearly contradictory to available data. If Mr. Oscher were concerned about some of the figures in that data, he had more than ample opportunity to address these concerns. However, the Court must not allow him to completely ignore this data, make up a hypothetical operating profit percentage, and attempt to proffer the opinion that this percentage is in fact the correct percentage to use when calculating

the profit of Defendant. It would difficult be to find a clearer case of an opinion based on unfounded and clearly contradictory assumptions, and therefore, all of Mr. Oscher's opinions concerning Defendant's profits must be excluded.

B. Plaintiff's Economic Damages

As an additional claim for damages, Plaintiff asserts that it is entitled to "Plaintiff's Economic Loss." Oscher Report at 4. However, these damages are premised on the underlying assumption that in 1994, by virtue of Defendant's adoption of the mark TIRES PLUS, it would have been considered either a conversion franchise or an initial franchise. Further, Plaintiff assumed that, by virtue of this association, Plaintiff would have collected licensing fees, royalty fees, maintenance fees, and inventory mark up revenue. SOF No. 6. This underlying assumption defies the facts of this case as admitted by Plaintiff. In 1994, Plaintiff did not have any stores outside of the Midwest. Id. No. 9. Thus, to say that, as of 1994, Plaintiff was suffering losses due to Defendant's use of the mark TIRES PLUS is nothing short of ridiculous.

In order to recover its economic damages, "plaintiff must prove it has been damaged by actual consumer confusion or deception resulting from the violation." Brunswick Corp. v. Spinit Reel Co. 832 F.2d 513, 525 (10th Cir. 1987). In addition, "damages are 'measured by any direct injury which a plaintiff can prove, as well as any lost profits which the plaintiff would have earned but for the infringement.'" First Savings Bank, F.S.B. v. U.S. Bancorp. 117 F. Supp. 2d 1078, 1087 (D. Kan. 2000) (quoting Lindy Pen Co., Inc. v. Bic Pen Corp., 982 F.2d 1400, 1407 (9th Cir. 1993)). Therefore, in order for Mr. Oscher's opinions to be admissible, they must be based on a reliable relationship to the actual damages Plaintiff would have avoided but for the actual confusion caused by Defendant's infringement.

The "but for" test suggested by the district court in First Savings Bank, suggests that the proper analysis here would be to ask: but for Defendant's adoption of the mark TIRES PLUS, would Plaintiff have been entitled to the various revenues it now seeks as damages? All of the evidence in this case reveals that Plaintiff was not even offering franchises in New Mexico in 1994. SOF No. 9. Second, it must be assumed that Defendant would be willing to purchase a franchise and had the financial ability to do so. Mr. Oscher himself stated that there was no evidence that Defendant would have accepted a franchise from the years 1994 through 2001, thus explicitly contradicting the very premise of his own opinions. Second Oscher Dep at 90, ll. 10-15. Mr. Oscher even admitted that assuming that such a franchise agreement would have been entered into is speculative. Id. at 92, ll. 9-13. These assumptions based on a hypothetical situation which could not have possibly occurred must be excluded.

C. Plaintiff's "Inventory Markup" Damages

In addition to the unjustified assumptions discussed in Section B above, over half of Plaintiff's alleged economic damages stem from an element Mr. Oscher referred to as "inventory markup." Oscher Report at 4. This element of damages is entirely composed of the income Plaintiff supposedly would have made by selling tires to Defendant. However, as will be shown below, this element of damages is the epitome of speculation. In light of the extreme liberties Mr. Oscher employed in deriving a number for this element of damages, any opinion related to inventory markup must be excluded.

As above, the first assumption necessary in order to arrive at Mr. Oscher's final damage calculation under inventory markup is that, in 1994, Plaintiff would have offered Defendant a franchise. This is ridiculous as Plaintiff was not, and is still not entering the New Mexico

market. SOF Nos. 7 & 9. Second, it has to be assumed that Defendant would have accepted such a franchise from Plaintiff. As Defendant has never sought to be franchisee, this is equally unlikely. As noted above, Mr. Oscher himself agreed that such a presumption was speculative. Second Oscher Dep. at 92, ll. 9-13. Third, and most importantly, it must be assumed that Defendant would have bought 62.8% of its tires from Plaintiff. SOF No. 11. This assumption is particularly baseless as Plaintiff does not require any of its franchisees to purchase their tires from it. Id. No. 12. Again, in Mr. Oscher's second deposition, he stated that if Defendant was not a franchise, he would not even have the ability to purchase tires from Plaintiff. Second Oscher Dep. at 93, ll. 2-4. Within this third assumption, Mr. Oscher also made the inherent assumption that Defendant could have purchased tires from Plaintiff at a cost less than it purchases tires from its current suppliers. However, Mr. Oscher has supplied no evidence that this was the case.

These assumptions underlying Mr. Oscher's calculation of inventory markup are so speculative as to render them completely inadmissible in the present case. There is no evidentiary support for these assumptions, and the assumptions defy historical fact. Therefore, Mr. Oscher's opinions as to inventory mark-up should be excluded.

IV. Any Probative Value Of Mr. Oscher's Testimony Would Be Substantially Outweighed By Prejudicial Effect To Defendant.

Even if Mr. Oscher's opinions are deemed reliable and relevant, they should be excluded under Rule 403 of the Federal Rules of Evidence. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Courts have excluded such economic data in trademark cases if the probative value of the expert's opinion are "substantially outweighed by the unfair prejudice and the confusion to the jury that would result from the authoritative rendering of such substantial damage estimates by a purported economic expert." First Savings Bank F.S.B. v. U.S. Bancorp., 117 F. Supp. 1078, 1085-86 (D. Kan. 2000).

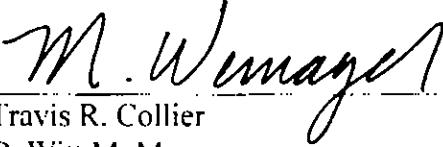
In the present case, Plaintiff has never suffered any instances of actual confusion, SOF No. 8 has not done any business in New Mexico, SOF Nos. 7 & 9 and does not seem to have been harmed by Defendant in any recognizable way. Yet Plaintiff's expert has divined that Plaintiff has suffered over \$1,000,000 in damages by Defendant's use a similar mark. Whatever probative value Mr. Oscher's exercises in speculation may have to any issue presently, the possibility of prejudice toward Defendant which would occur if Mr. Oscher were allowed to give his speculations a certain ethereal air of authority by virtue by qualifying his opinions as an "expert opinion" would substantially outweigh any such probative value.

VI. Conclusion

The district court for the District of Kansas, quoting a Seventh Circuit case, stated "[P]eople who want damages have to prove them." First Savings Bank F.S.B. v. U.S. Bancorp., 117 F. Supp. 1078, 1085 (D. Kan. 2000) (internal quotation marks and citation omitted). Mr. Oscher's opinions are driven by Plaintiff's desire to enhance damages. When the actual data and evidence in this case do not support certain elements of damages, Mr. Oscher has simply supplied his own data. First, Defendant has accumulated losses of over \$1,000,000, yet Mr.

Oscher has asserted that it had profits of \$560,000. Second, Plaintiff has never entered New Mexico, yet Mr. Oscher has asserted that it is due licensing fees, royalty fees, and inventory markup revenues dating back to 1994. Finally, with regard to inventory markup fees, Mr. Oscher asserts that Defendant, as a franchisee, would have bought 62.8% of its tires from Plaintiff without supplying any evidence that it would have been more economical for Defendant to do so, notwithstanding the fact that franchisees are not required to purchase any tires from Plaintiff. Cumulatively, Mr. Oscher's opinions do not rely on a single shred of evidence. In contrast, the assumptions necessary to arrive at Mr. Oscher's conclusions are clearly contrary to evidence submitted by both parties in this case. Based on the foregoing, Defendant prays that this Court grant its motion and exclude the report and testimony of Mr. Oscher.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a true and correct copy of the foregoing pleading to the following counsel of record on March 14, 2003:

Via Hand Delivery
Juan L. Flores, Esq.
Sheehan Sheehan & Stelzner
707 Broadway NE, Suite 300
Albuquerque, NM 87102

Via Courier
J. Todd Timmerman
Shumaker, Loop & Kendrick, LLP
101 East Kennedy Boulevard, Suite 2800
Tampa, Florida 33602

Dated this 14th day of March, 2003.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

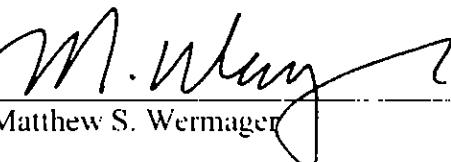
By: 
Matthew S. Wermager

EXHIBIT 37
(follows this page)

Team Tires Plus, Ltd.

v.

Tires Plus Inc.

August 13, 2002

Prepared by:

Oscher  Consulting

UNDERSTANDING

It is our understanding that Team Tires Plus, Ltd. ("Tires Plus" or "the Plaintiff") has filed a lawsuit against Tires Plus, Inc. ("TPI" or "the Defendant") alleging service mark infringement and unfair competition.

Tires Plus is a company engaged in the business of franchising and operating retail tire stores and automobile service centers nationwide. The service mark in question has been in use by the Plaintiff or its predecessor in interest since 1981. It is believed that subsequent to the adoption and use of the service mark, Tires Plus, by the Plaintiff, the Defendant began using the service mark, Tires Plus, in connection with its retail tire store and automobile service business in Albuquerque, New Mexico.

As a result of the Defendant's improper use of the service mark, Tires Plus believes they have been economically damaged. Oscher Consulting, P.A. and Steven S. Oscher, CPA have been engaged by counsel for the Plaintiff to calculate the economic loss.

BACKGROUND

Steven S. Oscher is a Certified Public Accountant and the Managing Director of Oscher Consulting, P.A. Prior to forming Oscher Consulting, Mr. Oscher was with an international accounting firm where he served as an Audit and Quality Review partner and Director of their Central Florida Litigation Services Department.

Mr. Oscher is a graduate of the University of South Florida and received his BS in Accounting in 1977. Mr. Oscher is a member of the Association of Certified Fraud Examiners and has been accredited as a Certified Fraud Examiner. He has also been accredited by the American Institute of CPA's in the area of Business Valuation. He has worked on numerous engagements involving issues of economic damages.

A copy of Mr. Oscher's curriculum vitae is attached as Exhibit I. A listing of cases in which Mr. Oscher has provided testimony at trial or deposition in the last four years is attached as Exhibit II. Mr. Oscher is compensated at the rate of \$225 per hour.

INFORMATION CONSIDERED

At this time, we are aware that discovery remains open and additional information may be provided. The documents we have obtained and considered are shown at Exhibit III.

FINDINGS

The economic damages to be considered in this matter are:

Defendant's Profits

It is our understanding that TPI was informed during 1994 that it was wrongfully using the service mark, Tires Plus, and a demand was made for them to cease and desist. We have requested financial statements and tax returns for TPI, but have only received redacted financial statements containing annual sales and marketing expense totals. Exhibit IV reflects annual revenue for TPI for 1994 through 2001 (mid-year information has not been provided by the Defendant). Without the Defendant's specific financial information, we have utilized published studies to provide a benchmark for TPI's expected operating profit. These studies indicate 3.3 percent would be an appropriate operating profit percentage. Therefore, for the period 1994 through 2001, the Defendant's calculated operating profit is \$ 560,000.

Plaintiff's Economic Damages

The Plaintiff's economic damages associated with the Defendant's infringement would primarily be earnings from initial franchise fees, royalty fees, maintenance/license fees, inventory markup, and advertising fees. Exhibit V provides the analysis of the damage component giving consideration to two different scenarios. The first assumes TPI would have been a converted franchisee, and the second scenario assumes TPI would be considered an initial franchisee. The Plaintiff's economic loss would range from \$565,000 to \$850,000.

Corrective Advertising

We understand an additional damage consideration may be needed for additional expenditures associated with corrective advertising. We are aware that TPI has produced their historical advertising expense for the years 1994 through 2001 as being \$180,922. At this time, we have asked for the Plaintiff's projected future costs to correct any false impressions associated with the improper use of the trademark. Such information has not yet been received.

Other

We are aware that Mr. Gary Fox, a tire store owner in Albuquerque, New Mexico, had expressed an interest in seeking a Tires Plus franchise operation. In the event the Court should find that the Defendant's actions prevented additional franchise opportunities from developing, economic damages similar to that shown on Exhibit V will need to be prepared.

We have prepared our calculations based on the presumption that the damage period commenced upon legal notification of the infringement. If the Court decides the period for calculation of economic damages is earlier than 1994, we will adjust our analysis accordingly.

EXHIBIT 38

(follows this page)

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW MEXICO
3 NO. CIV-01 1124 NME/RLP

4 TEAM TIRES PLUS, LTD., a
5 Minnesota corporation,
6 Plaintiff.

7 vs.
8 TIRES PLUS, INC., a
9 New Mexico corporation.
10 Defendant.

11

12 DEPOSITION OF STEVEN S. OSCHER
13 September 27th, 2002
14 9:15 a.m.
15 201 Third Street, Northwest, Suite 2200
Albuquerque, New Mexico 87102

16

17 PURSUANT TO THE FEDERAL RULES OF CIVIL
PROCEDURE, this deposition was:

18

19 TAKEN BY: MR. TRAVIS R. COLLIER
ATTORNEY FOR DEFENDANT

20

21 REPORTED BY: MICHELE TRUJILLO, CCR No. 226
Kathy Townsend Court Reporters
110 Twelfth Street, Northwest
Albuquerque, New Mexico 87102

22

23

A P P E A R A N C E S

For the Plaintiff:

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By: MR. C. PHILIP CAMPBELL, JR.

For the Defendant:

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Attorneys at Law
201 Third Street, Northwest, Suite 2200
Albuquerque, New Mexico 87102
By: MR. TRAVIS R. COLLIER
MR. MATTHEW WERMAGER

Also Present:

Mr. Donald Leonard
Mr. Bruce Malott

I N D E X

STEVEN S. OSCHER	PAGE
Direct Examination by Mr. Collier	4
CERTIFICATE OF COMPLETION OF DEPOSITION	129
SIGNATURE/CORRECTION PAGE	131

E X H I B I T S

MARKED

OSCHER EXHIBIT:
 72. Notice to Take Deposition Ducas Tecum 8
 73. Letter dated 9/16/02 to Mr. Morgan from
 Mr. Timmernan 9
 74. Report done by Oscher Consulting 10
 75. Two handwritten pages, beginning with
 "I, Tire Cost - (y)" 11
 76. Group of documents produced to Mr. Oscher,
 including financial information 31
 77. Team Tires Plus, Ltd., Economic Damages
 and Tires Plus, Inc., ("TPI"), Annual
 Revenue, with red markings 33
 78. Xerox copy of yellow stickie 48
 79. Xerox copy of yellow stickie 48
 80. Copy of Exhibit 75 handwritten pages with
 new calculations 86

STEVEN S. OSCHER

after having been first duly sworn under oath,
was questioned and testified as follows:

DIRECT EXAMINATIONBY MR. COLLIER:

Q. Good morning, Mr. Oscher. Is that a correct
pronunciation of your name?

A. It is, sir.

Q. As you know, we're here for your deposition
this morning. My name is Travis Collier. I represent
the defendant in this case, and I'm going to try to refer
to both parties as just the plaintiff and the defendant,
for the ease of use here.

I take it you've given many depositions. Is
that correct?

A. Yes, sir.

Q. And you sort of know the lay of the land, if
you will?

A. I hope so, yes, sir.

Q. If I should ask you anything you don't
understand, please let me know so that we make sure your
answers are accurate, all right?

A. Yes, sir.

Q. When were you first engaged in this matter?

A. I'm trying to think.

	37		39
1	A. If I had had complete financial information, it	1	stores for the repair shops.
2	would certainly have allowed me to consider the	2	So the accumulation of data seemed to come from
3	information more completely than I did, yes, sir.	3	enough different places that -- using it as a benchmark
4	Q. In fact, that would be your primary source for	4	was something I had done in other cases and I believed
5	determining the defendant's profits, would it not?	5	that it was reasonable and appropriate.
6	A. The accrual financial statements?	6	Q. Are you aware of any concerns that RMA itself
7	Q. Yes, sir.	7	has expressed about the use of its data?
8	A. That would always be so.	8	A. Well, they make a statement that it is not to
9	Q. Did you utilize any published studies besides	9	be used because they're not giving any reliance to it.
10	RMA?	10	The fact that RMA has put out these published
11	A. No, sir.	11	studies, it is commonly used in terms of just doing what
12	Q. I guess, for purposes of the record, would you	12	I'm doing and setting a benchmark. Nobody is saying that
13	identify what RMA is?	13	this is the way it actually is. It's just trying to give
14	A. Well, it used to stand for Robert Morris	14	the user of information the ability to see what the
15	Associates, but I think it's taken on a different -- the	15	industry may or may not be doing.
16	acronym stands for something else other than Robert	16	Q. Right. It's just a general guideline, if you
17	Morris Associates today.	17	will?
18	Q. Would you tell me how you determined the	18	A. Oh, absolutely.
19	defendant's profits?	19	Q. It certainly is not meant to be a specific
20	A. What I tried to do was find where there might	20	accounting of what Mr. Leonard made or did not take in
21	have been some published information relative to a tire	21	his business?
22	store operation that also had a service operation, repair	22	A. No, it couldn't be that. It's just to give me,
23	operation, associated with it. I didn't find any	23	as a provider of what I think is reasonable information,
24	published studies on point to that topic.	24	a benchmark, and that's how I've used it.
25	What I wanted to then do was find something	25	Q. And you're aware that there are concerns that
	39		40
1	that I thought could be close to the issue, and by going	1	the information may not be accurate because of geographic
2	to these published studies, I was able to take a look at	2	considerations, size of business, a whole host of
3	a tire operation, and that's why there's actually two	3	factors?
4	different studies here, the first being "Retail - Tires &	4	A. Well, on size of business, they actually try to
5	tubes," and the other would be "General Automotive Repair	5	help you. You're perhaps correct about geographics, but
6	Shops."	6	the study tends to break down the size of -- and sales
7	What I did was, in taking the profit	7	volume of different-size operations, so that, by itself,
8	information off of this study or these studies and then	8	is not an issue.
9	adjusting for what I believe -- from the redacted sales	9	Q. RMA believes it's an issue, don't they?
10	information that I received from Mr. Leonard's operation,	10	A. No. Otherwise, they wouldn't have -- I don't
11	the defendant's operation, I determined that about 60	11	believe they -- they would not have set out, you know,
12	percent of his sales were tire-related and 40 percent	12	that we're dealing with stores and sales volumes of
13	were repair-related, and I put that percentage to the	13	different sizes.
14	profit percentages from here, and that's how I came up to	14	Q. Would it be fair to state that you can't take
15	the 3.3 percent.	15	the RMA data and conclude that, because another -- an
16	Q. Do you have any concerns about relying on that	16	individual business is different, had different profit or
17	RMA information in trying to make a profit calculation?	17	loss, that they're necessarily not reporting their profit
18	A. No, I think that what -- if I could get it back	18	and loss accurately?
19	for a second --	19	A. I don't know that I understand what you just
20	MR. MALOTT: I'm sorry.	20	asked me.
21	THE WITNESS: Thanks, Bruce.	21	Q. You're not saying that you can use the RMA data
22	The studies that they have done here involved,	22	and compare it to an individual business, such as Mr.
23	at different points in time, well over 100, over 150	23	Leonard's, and come to the conclusion that the reports of
24	different tire stores, retail tire stores, and similarly,	24	Mr. Leonard are inaccurate?
25	for the auto repair shops, it was well over 300, 350	25	In other words, RMA might give you a conclusion

	41		43
1	that there's, across the board, a three-percent profit.	1	records.
2	That doesn't mean, if Mr. Leonard reports a loss, that	2	Q. But that's information that you requested
3	his reports are not accurate?	3	Mr. Timberman to give to you at one point, right?
4	A. Your last statement is a true statement. Your	4	A. Yes, sir.
5	other question, the answer to it is: I don't know.	5	Q. But you haven't looked at that since you've
6	When I start an investigation, one of the first	6	received it?
7	barometers I look at is as to, "What do I expect?" and	7	A. No. I looked at the information that was
8	RMA or any industry publications are the first source	8	contained in Mr. Malott's report. My comment spoke to
9	that I go to. If things seem to tie in, then at least it	9	what the underlying information that made up those
10	gives me some understanding of the business operation.	10	numbers that were reported, either on the compiled
11	Q. But the primary source that you would look at	11	financial statements or on the tax returns, was.
12	to determine if Mr. Leonard was profitable or not would	12	Q. But you haven't used Mr. Leonard's numbers to
13	be his own financial statements?	13	come up with a profit or loss number?
14	A. Certainly, his financial statements are the	14	A. Well, I did use his sales numbers. It was that
15	first source of information, the detail of his	15	redacted information that we initially received.
16	accounting, yes, sir.	16	Q. But you didn't use his expense numbers?
17	Q. Have you undertaken any review of his financial	17	A. I didn't have his expense numbers.
18	information in determining his profits?	18	Q. You had them as of two or three weeks ago; is
19	A. I have not done a study on his information, no,	19	that correct?
20	sir.	20	A. Two or three -- again, as I'm saying, when I
21	Q. Have you been given a copy of Mr. Malott's	21	looked at the information, I didn't -- it called into
22	report and attachments?	22	question the reliability of the information, and I didn't
23	A. Yes, sir.	23	see, at that point in time, the need to make any
24	Q. When did you receive that?	24	modification of my numbers.
25	A. Probably a couple of weeks ago.	25	Q. Would you agree with me, if a jury finds that
	42		44
1	Q. Were you aware that Don Leonard's specific	1	Mr. Leonard's numbers are reliable, that Mr. Leonard's
2	information was contained as exhibits to Mr. Malott's	2	operation would not have made a profit over the years
3	report?	3	that you've looked at?
4	A. It wasn't contained as specific information.	4	A. I'm hesitating, because I don't know how you're
5	It was certain financial statements and tax returns.	5	defining as "profit." If you could help me with that,
6	Q. Right, but the specific information concerning	6	then I'd like to answer your question.
7	the expenses for Mr. Leonard's business were set out in	7	Q. Well, let me ask you how you define "profit."
8	exhibits to Mr. Malott's report, were they not?	8	A. I define it as the appropriate business
9	A. Well, Mr. Malott copied, or people in his	9	expenses taken away from appropriate, properly recorded
10	office copied, information that was picked up off of	10	business revenue.
11	financial statements or tax returns. I mean, that's my	11	Q. If you were to assume, first of all, that all
12	understanding.	12	of Mr. Leonard's income and expenses were appropriately
13	Q. Did you make any effort to try to determine	13	recorded, as given to you in the Malott information,
14	Mr. Leonard's profits and losses using that material?	14	would you agree with me, over the years that you've
15	A. Other than raising questions because things	15	looked at, that his firm has not had a profit?
16	certainly seemed out of order, I didn't do anything more	16	A. If they were reasonable and appropriate --
17	than that at this time, no, sir.	17	again, I -- what's -- I don't know how to answer that
18	Q. But you would agree with me that that's a	18	question, and I'm not trying to be evasive, but I'm just
19	better indication of what his profits and losses would be	19	simply saying that, you know, without going in and -- for
20	as compared to the RMA information?	20	example, I understand that there's personal expenses that
21	MR. CAMPBELL: Objection; vague.	21	Mr. Leonard has acknowledged are recorded in there.
22	A. I don't know that I -- again, I don't know what	22	I don't know whether those are meaningful or
23	I don't know, because I haven't done anything to truly	23	not. I know Mr. Malott testified yesterday that he asked
24	look at the underlying issues that relate to the expenses	24	the question and that he was told that they weren't, but
25	or the sales that Mr. Leonard reported on his financial	25	I don't know that Mr. Malott or the people in his office

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1 did any further investigation of them. In fact, I don't
2 think they did.

3 So the fact that there's a recording of
4 numbers, I'm not prepared to buy into the fact that they
5 have been properly recorded, but maybe the answer to your
6 question is, if a jury finds that everything has been
7 properly recorded, would I agree that that was the best
8 evidence? Yes, sir, I would.

9 Q. And if a jury finds that his expenses and
10 income have been properly recorded, would you also agree
11 that he has not had a profit for those years which you
12 examined?

13 A. No, I can't say that, sir.

14 Q. Why not?

15 A. Well, because, yesterday, even Mr. Malott
16 indicated that the "profit" issue is one that -- he is
17 taking out interest. He is taking out rent on top of his
18 salary. That may, if looked at more closely, in fact,
19 constitute a profit to Mr. Leonard personally from the
20 business.

21 Q. Have you looked at any issues concerning
22 interest or rent to Don Leonard yourself?

23 A. It has only come up as part of my review in
24 preparation for Mr. Malott's deposition yesterday and his
25 testimony yesterday.

1 business has not been profitable for the years that you
2 examined?

3 MR. CAMPBELL: Objection, asked and answered.
4 A. If they say that the expenses are greater than
5 the income, would I agree that that mathematical
6 calculation would show a loss? The answer is yes.

7 Q. How did you ascertain your 3.3 percent?

8 A. I don't know whether it was copied. I had --
9 I'm sorry.

10 I think, when this was given, I had some
11 percentages on here. I didn't see it when you handed me
12 that document earlier.

13 Q. So for the purposes of identifying this, you've
14 brought the same pages of the RMA guide with you here
15 today, but on those are some yellow Post-it notes that
16 have some calculated percentages: is that correct?

17 A. Yes, sir. Again, that was part of what
18 Mr. Campbell provided you.

19 Q. This morning?

20 A. This morning, sir.

21 Now, I think these have been provided to you
22 earlier.

23 Q. The pages had, but --

24 A. The pages had, but I didn't see that these
25 little stickies had been copied when they were copied.

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1 Q. So as we sit here today, you do not hold any

2 opinion that any interest or rent paid by the defendant
3 was inappropriate. Is that a fair statement?

4 A. I don't know what it is. I can't answer that.

5 Q. And, likewise, you have no opinion, as we sit
6 here today, as to whether or not there have been personal
7 expenses recorded in an amount that would change the
8 bottom line of his business?

9 A. I don't know the answer to that.

10 Q. But assuming that interest and rent had been
11 appropriately paid and recorded and the jury were to so
12 find that, then would you agree that the defendant was
13 not profitable in the years that you examined?

14 A. Well, that would be a jury finding at that
15 point, not my finding.

16 Q. But if they were to make an initial finding
17 that his expenses were properly recorded, would you agree
18 then that there was no profit to the defendant during the
19 years that you looked at?

20 A. I don't know that I can make that statement
21 without me looking at it in detail myself. What the jury
22 may or may not do is certainly in their purview.

23 Q. I'm asking you to assume that they believe
24 everything has been properly recorded. In that case,
25 given that assumption, would you agree that Mr. Leonard's

1 Q. Correct.

2 A. And so I --

3 Q. That's something new; is that correct? The
4 yellow Post-its are new?

5 A. I don't --

6 Q. To us.

7 A. It seems they were from the -- I mean, they've
8 always been on there, so --

9 Q. Let's do this. Let's take a break and get
10 these copied. Is it just the two of these yellow
11 Post-its?

12 A. Yes, sir.

13 Q. All right.

14 A. I mean, they can probably put them on one, but
15 each one --

16 Q. All right. Let me get that done.

17 A. Okay.

18 (Recess taken.)

19 (Oscher Exhibits 78 and 79 marked.)

20 Q. Let me show you what I've marked as Exhibits 78
21 and 79. Are those copies of the yellow stickies that
22 we've just talked about?

23 A. They are, sir.

24 Q. Let's take Exhibit 78 first. Tell me where you
25 got those numbers.

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	81		83
1	appears on -- I forget the exhibit number.	1	Q. All right.
2	Q. Exhibit 75.	2	A. That became my denominator.
3	A. Yes, sir. It's this number right here, all	3	So for '97, my calculation was that 67.3
4	right?	4	percent of their sales volume was based on tires, and
5	Q. All right.	5	then I did the same calculation for '98, '99 and 2000
6	A. For the other internal reports, I've taken that	6	for the other documents.
7	same number across to determine what their profit margin	7	Q. Now, how does that tell you what percentage of
8	is on tire sales, and that's where I've derived the 76.7,	8	tires that franchisees will buy?
9	the 76.6, 76.8; the 77.1 percent, to come to this	9	A. If you allow me to go through the rest of it,
10	four-year average, which is really a three-and-a-half-	10	it -- from my standpoint, it had to work in steps, and
11	year, if you will, of 76.8 percent that's used in my	11	what I'm doing with, essentially, A, B and C is I'm
12	report.	12	laying a predicate for my calculation.
13	Q. Okay. I understand that.	13	Q. So the 67.3 percent represents what, again?
14	A. Good. Do you want to go to the next	14	The percentage of tire sales to total sales?
15	percentage?	15	A. That's correct, sir. Okay?
16	Q. I think so.	16	Q. All right. Now, let me just ask you one thing.
17	MR. COLLIER: Just off the record for a minute.	17	I'm sorry, but before I leave that --
18	(Off-the-record discussion.)	18	A. Yeah.
19	Q. Let's go to the next one, Roman numeral II on	19	Q. -- that 55 million includes not only retail new
20	Exhibit 75.	20	tires, but wholesale tires, used tires?
21	A. Okay. The second issue was that the	21	A. It's everything.
22	franchisees are not required to purchase tires from the	22	Q. Would you expect used tires to be sold to
23	franchisor, but that a significant percentage of the	23	franchisees?
24	tires that have been purchased historically are being	24	A. I don't know whether they were retreads, but
25	purchased from the franchisor by the franchisees, to the	25	the answer is, again, for purposes of my calculation, it
	82		84
1	tune of 85 percent.	1	was such an insignificant part of the tire sales that any
2	That was the original comment that was made or	2	residual difference I didn't see as making a big
3	the original information that was given. What I then	3	difference to my overall calculation.
4	needed to find out was what percentage might that be when	4	Q. All right. Go ahead.
5	I looked at the information.	5	A. The second calculation was total franchisee
6	So the first assumption or the first thing I	6	sales, and on that number, I needed to go to Oscher Bates
7	needed to do was to find out the inventory -- well, that	7	number 39.
8	was the objective, to find out the inventory purchased,	8	Q. Okay.
9	and I'm referring now to -- is that Exhibit 75?	9	A. I'm going to give you a specific number.
10	Q. Yes.	10	Q. Ask him.
11	A. Okay. Under II-A, what relationship of tire	11	A. Now, see, I don't know whether this is a --
12	sales to total sales exists within the franchise system?	12	MR. COLLIER: Off the record.
13	So what I utilized was a -- if I can -- in the	13	(Off-the-record discussion.)
14	third grouping down, you see "Total Tire/Tire Related	14	Q. Back on the record.
15	Sales" of 55 million, 55.8 million.	15	A. The Bates-numbered document 39, on the far
16	Q. For "FY Actual," this year actual?	16	left-hand side is a number that is 26.8 million.
17	A. Yes, sir. Right.	17	Q. Under what column are you looking?
18	Q. It's on Oscher 0024; is that correct?	18	A. I'm sorry. Let me help you here.
19	A. Yes, sir, it's the same document.	19	Q. You're looking on the right-hand column --
20	Q. Okay.	20	A. Yeah.
21	A. Under '97 on Exhibit 75, there's a cross-out,	21	Q. -- "Year-to-Date," and it says "Last Year
22	but do you see the .55.9 as the numerator?	22	Actual."
23	Q. Uh-huh.	23	A. So those are the total sales.
24	A. The denominator -- if you look all the way to	24	Q. This is Oscher 0039.
25	the bottom, you see total sales of 83.1 million.	25	A. And I may have transposed that, because, for

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<p>1 for 1997, in order to make that determination, I needed 2 to take the information from B, which was franchisee 3 sales, to that percentage which were tire sales.</p> <p>4 So by multiplying II-B by II-A, it gave me the 5 calculation for '97 of 22.9 and the other calculations. 6 That's just a mathematical calculation there.</p> <p>7 Q. All right. Did you say multiply or divide?</p> <p>8 A. I was multiplying -- in II-D, I was multiplying 9 the amount of franchisee sales, because that was total 10 sales, by that amount which were franchise sales -- or, 11 excuse me, which were tire sales.</p> <p>12 If you remember, in A, we made an allocation 13 for the various stores between tires and other products.</p> <p>14 Q. Well, I might be missing something here, but B 15 is all franchisee sales.</p> <p>16 A. Right.</p> <p>17 Q. C is simply those tire purchases by 18 franchisees.</p> <p>19 A. That's right. We'll get to C in a second, with 20 another calculation. All I'm trying to do is put numbers 21 in in terms of coming to a percentage, which will 22 eventually be those -- the percentage of tires bought 23 from the franchisor.</p> <p>24 Q. But I don't understand why you're multiplying, 25 to tell you the truth.</p>	<p>89</p> <p>1 were made by the franchisees, there was probably less 2 than five percent that were being used from the 3 franchisee, and I just picked up the whole number.</p> <p>4 But when I looked at the individual items, they 5 were not buying a lot of the parts, and when I inquired 6 about that, not unlike the tires, the franchisees had the 7 ability to purchase parts from other locations or from 8 other sources other than Team Tires.</p> <p>9 Q. So you discount that as insignificant?</p> <p>10 A. Yes, sir, discount it --</p> <p>11 Q. So let's go back to Roman numeral II-E.</p> <p>12 A. What I then needed to do was, the amounts that 13 had been calculated as far as franchisee tire sales in 14 total, I needed to make a determination as to what the 15 cost of those tires would have been, and I used the 16 percentage from I, the tire cost, and I multiplied that 17 by the franchisee cost in D, and the calculations are 18 17.6 million in '97 and then the other amounts.</p> <p>19 Q. So you used the results of D, and you 20 multiplied that against which section?</p> <p>21 A. The first -- on the first page, what the tire 22 cost calculation was.</p> <p>23 Q. The 76.8 percent?</p> <p>24 A. 76.7 percent. Well, I didn't use the four-year 25 average. I didn't get the four-year average until</p>
<p>1 A. Okay. I know that the ratio of tires to total 2 sales, which is what calculation A was about, was -- tire 3 sales were, in '97, 67.3 percent.</p> <p>4 Q. Oh, excuse me.</p> <p>5 I got you now. So D is B times A?</p> <p>6 A. That's right.</p> <p>7 Q. So your assumption A was tire sales to total 8 sales of the plaintiff itself?</p> <p>9 A. Right.</p> <p>10 Q. And you've assumed that that's the same 11 percentage that a franchisee would have?</p> <p>12 A. That's correct.</p> <p>13 Q. Let me ask you this question. Going back to 14 calculation Roman numeral II-C, that figure is listed, to 15 include tires, batteries and parts, on Oscher 0038.</p> <p>16 A. Which number did you give me?</p> <p>17 Q. 0038, Oscher.</p> <p>18 A. You're giving me a Bates number.</p> <p>19 Yes, sir.</p> <p>20 Q. So Roman numeral II-C is not just tire 21 purchases; is that correct?</p> <p>22 A. That's correct.</p> <p>23 Q. Do you take care of that later on or something?</p> <p>24 A. Well, what I did was -- I didn't have enough 25 information, but when I reviewed the parts sales that</p>	<p>90</p> <p>1 afterwards. I used each individual year as the 2 calculation. So I multiplied the 22.9 million --</p> <p>3 Q. Okay.</p> <p>4 A. You're okay?</p> <p>5 Q. Right. Okay. I see what you're saying you 6 did.</p> <p>7 So you multiplied the Roman numeral I 8 calculation times Roman numeral II-D?</p> <p>9 A. Right.</p> <p>10 Q. What is calculation Roman numeral II-F?</p> <p>11 A. And then II-F finally allowed me to get to the 12 percentage of tires purchased from the franchisor. The 13 11.6 million in item C is the amount that we just talked 14 about, and when you divide that by the calculation in 15 II-E, the 17.6, you get 65.9 percent.</p> <p>16 Then, when you multiply -- I'm sorry. Then you 17 do the same multiplication, the same calculation, for the 18 other years, as well.</p> <p>19 Q. So calculation F is what divided by E?</p> <p>20 A. It is C.</p> <p>21 Q. C divided by E.</p> <p>22 A. What the tire purchases were from the 23 franchisees.</p> <p>24 Q. So your conclusion, then, is that franchisees 25 purchased, on average, 62.9 percent of their tires from</p>
<p>1 for 1997, in order to make that determination, I needed 2 to take the information from B, which was franchisee 3 sales, to that percentage which were tire sales.</p> <p>4 So by multiplying II-B by II-A, it gave me the 5 calculation for '97 of 22.9 and the other calculations. 6 That's just a mathematical calculation there.</p> <p>7 Q. All right. Did you say multiply or divide?</p> <p>8 A. I was multiplying -- in II-D, I was multiplying 9 the amount of franchisee sales, because that was total 10 sales, by that amount which were franchise sales -- or, 11 excuse me, which were tire sales.</p> <p>12 If you remember, in A, we made an allocation 13 for the various stores between tires and other products.</p> <p>14 Q. Well, I might be missing something here, but B 15 is all franchisee sales.</p> <p>16 A. Right.</p> <p>17 Q. C is simply those tire purchases by 18 franchisees.</p> <p>19 A. That's right. We'll get to C in a second, with 20 another calculation. All I'm trying to do is put numbers 21 in in terms of coming to a percentage, which will 22 eventually be those -- the percentage of tires bought 23 from the franchisor.</p> <p>24 Q. But I don't understand why you're multiplying, 25 to tell you the truth.</p>	<p>89</p> <p>1 were made by the franchisees, there was probably less 2 than five percent that were being used from the 3 franchisee, and I just picked up the whole number.</p> <p>4 But when I looked at the individual items, they 5 were not buying a lot of the parts, and when I inquired 6 about that, not unlike the tires, the franchisees had the 7 ability to purchase parts from other locations or from 8 other sources other than Team Tires.</p> <p>9 Q. So you discount that as insignificant?</p> <p>10 A. Yes, sir, discount it --</p> <p>11 Q. So let's go back to Roman numeral II-E.</p> <p>12 A. What I then needed to do was, the amounts that 13 had been calculated as far as franchisee tire sales in 14 total, I needed to make a determination as to what the 15 cost of those tires would have been, and I used the 16 percentage from I, the tire cost, and I multiplied that 17 by the franchisee cost in D, and the calculations are 18 17.6 million in '97 and then the other amounts.</p> <p>19 Q. So you used the results of D, and you 20 multiplied that against which section?</p> <p>21 A. The first -- on the first page, what the tire 22 cost calculation was.</p> <p>23 Q. The 76.8 percent?</p> <p>24 A. 76.7 percent. Well, I didn't use the four-year 25 average. I didn't get the four-year average until</p>
<p>1 A. Okay. I know that the ratio of tires to total 2 sales, which is what calculation A was about, was -- tire 3 sales were, in '97, 67.3 percent.</p> <p>4 Q. Oh, excuse me.</p> <p>5 I got you now. So D is B times A?</p> <p>6 A. That's right.</p> <p>7 Q. So your assumption A was tire sales to total 8 sales of the plaintiff itself?</p> <p>9 A. Right.</p> <p>10 Q. And you've assumed that that's the same 11 percentage that a franchisee would have?</p> <p>12 A. That's correct.</p> <p>13 Q. Let me ask you this question. Going back to 14 calculation Roman numeral II-C, that figure is listed, to 15 include tires, batteries and parts, on Oscher 0038.</p> <p>16 A. Which number did you give me?</p> <p>17 Q. 0038, Oscher.</p> <p>18 A. You're giving me a Bates number.</p> <p>19 Yes, sir.</p> <p>20 Q. So Roman numeral II-C is not just tire 21 purchases; is that correct?</p> <p>22 A. That's correct.</p> <p>23 Q. Do you take care of that later on or something?</p> <p>24 A. Well, what I did was -- I didn't have enough 25 information, but when I reviewed the parts sales that</p>	<p>90</p> <p>1 afterwards. I used each individual year as the 2 calculation. So I multiplied the 22.9 million --</p> <p>3 Q. Okay.</p> <p>4 A. You're okay?</p> <p>5 Q. Right. Okay. I see what you're saying you 6 did.</p> <p>7 So you multiplied the Roman numeral I 8 calculation times Roman numeral II-D?</p> <p>9 A. Right.</p> <p>10 Q. What is calculation Roman numeral II-F?</p> <p>11 A. And then II-F finally allowed me to get to the 12 percentage of tires purchased from the franchisor. The 13 11.6 million in item C is the amount that we just talked 14 about, and when you divide that by the calculation in 15 II-E, the 17.6, you get 65.9 percent.</p> <p>16 Then, when you multiply -- I'm sorry. Then you 17 do the same multiplication, the same calculation, for the 18 other years, as well.</p> <p>19 Q. So calculation F is what divided by E?</p> <p>20 A. It is C.</p> <p>21 Q. C divided by E.</p> <p>22 A. What the tire purchases were from the 23 franchisees.</p> <p>24 Q. So your conclusion, then, is that franchisees 25 purchased, on average, 62.9 percent of their tires from</p>

	93		95
1	the franchisee?	1	Q. Now, is there another document somewhere within
2	A. For the period of information we had available,	2	this packet for the margin as to all tire sales?
3	yes, sir.	3	A. That was the 30 percent that was the margin --
4	Q. What's calculation Roman numeral III?	4	total margin that they had on tires, which was the first
5	A. Three, if -- and let me give you -- what I took	5	calculation that we looked at.
6	is the margin from tire sales by franchise of the	6	Q. Have you done any checking to determine if
7	franchisor to the franchisee.	7	these records are accurate?
8	Q. Excuse me. You mean item Roman numeral III?	8	A. The checking that I did was -- and now we go
9	A. Yes.	9	into the Price Waterhouse and Coopers financial
10	Now, we're looking at Bates number 38, but the	10	statements.
11	numbers, as you pointed out earlier, included tires and	11	The opening information that was given in these
12	batteries, and they were making different calculations	12	reports was anchoring, if you will, the sales, and it's
13	internally. What I went to was the '98 report, and I'll	13	essentially the first page in each of the documents,
14	give you a Bates number.	14	where they're reporting what their income was and what
15	On Bates number 84, Oscher 84, if you go to the	15	their total sales were.
16	Year-To-Date column or section, the second group of	16	I went to the audited financial statements and
17	numbers -- the third group of numbers makes reference to	17	confirmed those balances as they appeared and used that
18	total margin tires, and then underneath that is a	18	as my benchmark.
19	percentage and it says 12.72.	19	Q. Did you double-check on the margin?
20	Q. I'm not seeing that.	20	A. I didn't do anything with the margins. Again,
21	A. I know, that's a tough one.	21	those are internally generated financial statements.
22	Is that it right there?	22	I wasn't going to go in and re-audit the books.
23	Q. Okay.	23	The audited financial statements stand for themselves, at
24	A. Yeah, and then --	24	least in this regard, and I was concerned that I was
25	MR. MALOTT: This needs to be on the record, so	25	dealing with the total sales which had been set forth in
	94		96
1	we know.	1	these internal documents, which made their way up to the
2	Q. On Oscher 84, under the right-hand	2	audited financial statements.
3	"Year-To-Date" column, under "FY Actual," the very last	3	Q. So does that complete how you calculated these
4	number under that first -- or, actually, the second	4	three percentage figures?
5	grouping is entitled "Percentage Sales," including direct	5	A. Yes, sir, it does.
6	"something or another."	6	MR. COLLIER: Okay. I will ask Matt to get
7	If you go across, there's a percentage listed	7	Donnie.
8	as 12.72. What does that represent to you?	8	MR. CAMPBELL: I'll get him.
9	A. That is the margin on sales of tires that were	9	(Recess taken.)
10	made by the franchisor from the --	10	Q. Show me, then, where you plugged these
11	Q. So that's what they state that they're marking	11	percentages into your report.
12	the tires up to sell to their franchisees?	12	A. Sure.
13	A. That's what they're saying that they were	13	We were talking, on Exhibit IV -- and this is
14	making. That's my understanding, yes, sir.	14	my Exhibit IV. I don't know. Have you marked those?
15	Now, if you move over to the two columns to the	15	Q. Your Exhibit IV, which for our record is
16	Last Year Actual, that's where you get the percentage	16	Exhibit 77.
17	that you see on Exhibit 80, the 11.87 percent, because,	17	A. Right. Thank you.
18	unlike the '97 internal financial report, they had set	18	Q. Exhibit 77 is Exhibits IV and V as you redid
19	out the information for just tires only, and so it was	19	them this morning.
20	picked up there.	20	A. Yes, sir.
21	Q. So what this tells you is that their margin is	21	Q. And as I understand you, right now, you're
22	actually -- or the markup is actually 11.8 percent	22	going to redo it one more time?
23	instead of the eight percent that you were previously	23	A. I am.
24	told?	24	Q. So let's go to your Exhibit IV contained within
25	A. That's correct, sir.	25	our Exhibit 77. Tell me what you've done.

	101		103
1	don't know the answer.	1	A. No, sir.
2	Q. From just a business point of view -- well,	2	Q. Have you ever seen them?
3	strike that.	3	A. I have not seen them, no, sir.
4	Are you aware of any evidence -- besides this	4	Q. Can you show me what document, if any, you did
5	notion that a Mr. Gary Fox had made an inquiry, are you	5	use for the one-percent base and the four-percent base
6	aware of any other evidence that the plaintiff was	6	numbers?
7	interested in opening any franchises here in New Mexico	7	A. It would have been within the documents that
8	at any time?	8	were produced, that are part of the records that were the
9	A. Sitting here now, I'm not recalling any, no,	9	documents considered. Whatever I had, I used as a basis.
10	sir.	10	My question was: Was the one percent and the
11	Q. On what basis did you make your assumption that	11	four percent, as it's set out here as a percentage -- was
12	Don Leonard would have opened as a franchise in 1994?	12	that the same in '94? I believe Mr. Slattery answered
13	A. I believe that was an assumption that I was	13	that it was.
14	asked to consider by the attorneys.	14	Before that, it was his understanding -- and I
15	Q. Something Mr. Timmerman asked you to do?	15	forget what time period, but it was either the late '80s
16	A. Either Mr. Timmerman or Mr. Campbell.	16	or '90s, that he had indicated that they had had a
17	Q. And your assumption is that he would have	17	three-percent fee as opposed to the four percent that was
18	opened in 1994; is that accurate?	18	now being used.
19	A. Yes, sir.	19	Q. Let me show you what's been previously marked
20	Q. Is that --	20	as Defendant's Exhibit 4, and referring to page 11P
21	A. That's what my calculations are based on, yes,	21	05773, this is a franchise offering circular indicating a
22	sir.	22	continuing fee amount of four percent of gross receipts.
23	Q. Are you aware -- well, strike that.	23	Do you see that on page 05773?
24	Let me ask this. If he had opened as a	24	A. Yes, sir.
25	franchisee in 1994, would it be appropriate to assume	25	Q. With a Footnote 2 that indicates, if you're
	102		104
1	that he would have opened as a franchisee using a 1994	1	converting, that you have an additional one percent, and
2	franchise agreement as opposed to one that had been	2	that's on page 05776. Is that where you got your initial
3	modified later, in 2000 or 2001?	3	continuing fees?
4	A. Yes, sir.	4	A. I think I just said I don't know whether it was
5	Q. Have you been supplied with a 1994 franchise	5	this document that I had or if there was another
6	agreement?	6	document.
7	A. No, sir, I don't recall that I have.	7	I saw this. You said it was 2002, and if you
8	Q. The numbers that you've used in your report, as	8	had asked me without telling me that, I would have said
9	far as I can tell, come from a 2001 or 2002 franchise	9	that I thought I had seen an earlier circular that was
10	circular. Is that accurate?	10	contained within the documents. That's all.
11	A. I'm not sure. I would have told you it was an	11	Q. Well, can I ask you to please get to Mr.
12	earlier circular, but I'm not sure.	12	Campbell a copy of the circular that you feel you're
13	Q. Do you know whether the numbers you used to	13	basing your conclusions on?
14	calculate damages were the correct numbers that were used	14	A. Okay. I mean, that one works as well. I mean,
15	in 1994?	15	it's very possible that it could have been. I'll check
16	A. My understanding is that the percentages were	16	to see if I have an earlier circular with that
17	the same percentages back then. I asked the question.	17	information in it.
18	Q. Who told you that they were the same	18	Q. Right. You would agree that it would be
19	percentages?	19	appropriate to use the 1994 circular, not the 2002
20	A. I think it was Mr. Slattery.	20	circular?
21	Q. Did you ask for any documents to support that?	21	A. Well, I would agree that it would -- if the
22	A. I'm sure I did.	22	information from 1994 is the same as in the 2002 one,
23	Q. Do you have those?	23	it's the percentage that matters, not the circular that
24	A. I don't.	24	matters.
25	Q. Do you have them in your office?	25	Q. But the percentage comes from the circular?

	105	
1	A. Well, the percentage is stated in the circular.	1 be paid would be after establishing what the prior year
2	It comes from the corporate office.	2 base was for, what the base would be for a converting
3	Q. For example, let me show you a circular that is	3 franchisee's operation.
4	dated as being effective in May 2000, two years before	4 In this case, it would be the \$1,497,000 base,
5	2002, and the containing fees in that circular are only	5 so that a percentage would be paid on that of one
6	four percent instead of an additional one percent add-on.	6 percent, and that the increase of four percent -- or the
7	A. I don't know that I've seen this. I mean, it's	7 four percent on increased sales.
8	2000. I don't have any Bates numbers on here, so I don't	8 Q. Your base is \$1,497,719, and that came from
9	know -- to compare it to the documents that I've	9 what document?
10	received.	10 A. It's actually Exhibit IV.
11	I did not see this. I have not seen this, sir.	11 Q. Exhibit IV, from Don's 1993 total sales?
12	Q. Does that raise your suspicions, perhaps, that	12 A. Yes, sir.
13	your percentages may not be correct?	13 Q. And I see that you dropped your advertising
14	A. If -- this would certainly suggest that they	14 expenses from the first calculations in your first report
15	use, as a base, four percent and then charge four percent	15 of August 2002.
16	over that base for converting stores. That's what it	16 A. Yes, sir.
17	says, yes, sir.	17 Q. Is that because the franchising circular
18	Q. So would you agree that what we need to do is	18 indicates that all of that is to be expended and it's
19	find out what franchise agreement was in place in 1994?	19 not --
20	A. Well, to the extent that it would be any	20 A. Yeah. That was based on my confirmation in
21	different from this, the answer is that's correct. If it	21 talking with Mr. Slattery that that is, in fact, what
22	was the same in '94 as here, then we would have our	22 they did do, yes, sir.
23	benchmark.	23 Q. Are you aware that that's, indeed, what the
24	Q. And we don't know that, sitting here today, do	24 franchise circular represents that they will do, use all
25	we?	25 of the advertising money for actual expenses?
	106	
1	A. No, sir, other than what Mr. Slattery told me.	106 A. It did. When the number was first given to me,
2	Q. Now, is it your understanding, in 1994, that	2 I raised that as a question, and they said -- "they"
3	Don Leonard had existing stores?	3 being what I discussed with Mr. Timmerman. I said,
4	A. Yes, sir.	4 "That's one of the things that I needed to talk to Mr.
5	Q. If that was the case, there would be no reason	5 Slattery about."
6	for him to apply as a new franchisee, would there, as	6 Q. Now, I note that your deduction amount has
7	compared to a conversion franchisee?	7 changed from 28 percent to five percent.
8	A. Again, I don't know the answer to that. I	8 A. Yes, sir.
9	would have expected it to be as a conversion, but since I	9 Q. Explain to me, first of all, how you calculated
10	didn't know what the parameters might be, that's the	10 28 percent and then why you have now changed that to five
11	reason that I used the alternative.	11 percent.
12	Q. Right. But your best judgment would be, if Don	12 A. When I was first given the information -- and
13	had converted to a franchise in 1994, that would be as a	13 the discussion with the numbers involved franchise fees
14	conversion business, because he had existing stores?	14 and converting fees for each existing store or a new
15	A. That's what I would have thought, yes, sir.	15 store, which was the \$15,000 amount per store -- my
16	Q. Which would mean that your calculations as a	16 comment at that point in time was that it was my
17	conversion franchisee would be the more probable	17 understanding that there were fees that would be involved
18	calculation, not as a new franchisee?	18 as far as earning those revenues and, similarly, as it
19	A. Again, from a straight business standpoint,	19 related to tire sales and everything else that the
20	that's what I would expect, but I don't know all of the	20 franchisor was doing.
21	nuances.	21 I've been told that there was a report that
22	Q. Now, I think I understand this, but why don't	22 indicated that they had evaluated all of that information
23	you, for the record, just explain the one-percent base	23 and that the cost associated with the earning of those
24	calculation.	24 revenues from a franchisee's standpoint was at 28
25	A. My understanding was that the fees that would	25 percent. I, again, said, "I would like to see the

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1 taking a look at a franchise for a day once a quarter
 2 would have not been a very expensive flight, and, again,
 3 within the five percent, it was discussed and felt that
 4 it was covered.

5 Q. Is Exhibit 77, then, your final calculation as
 6 to economic damages for the plaintiff in this case?

7 A. From the facts as I understand them today, yes,
 8 sir.

9 Q. Would it be fair to say that you don't have any
 10 other calculations of royalties or franchise fees or any
 11 other fees that you believe may be due to the plaintiff
 12 as a result of any alleged trademark violation in this
 13 case?

14 A. I have not done any other calculations, no,
 15 sir.

16 Q. And you're not aware of any other valuation of
 17 that that you haven't done in this case?

18 A. I'm confused by your question. Are you asking
 19 has somebody else other than me made a calculation?

20 Q. No. Do you intend to do any other type of
 21 valuation besides what you've given us in Exhibit 77?

22 A. Again, I don't know. If additional information
 23 comes to light and I'm asked by Mr. Campbell to do work,
 24 I will.

25 Q. All right. And then you'll let us know about

1 A. I don't have any direct information, no, sir.
 2 Q. And you've not been given any information from
 3 the plaintiffs, as you suggest in your report, about
 4 that?

5 A. I have not received any information from the
 6 plaintiffs, no.

7 Q. You've testified earlier, from a review of
 8 Don's financials, as stated in his papers, that he was
 9 not profitable; is that correct?

10 A. His tax returns and his financial statements
 11 return a loss, 14 of 15 years.

12 MR. CAMPBELL: Just so the record is correct,
 13 when you say "his," are you referring to the Defendant
 14 Team -- excuse me, Tires Plus, Inc.?

15 THE WITNESS: For the stores and the
 16 information that was reported by Mr. Leonard, yes, sir.

17 MR. CAMPBELL: You used the pronoun "his," and
 18 I wanted to make sure --

19 THE WITNESS: Well, he asked me about Don. I'm
 20 sorry.

21 Q. You understand that when I've been using "Don
 22 Leonard," I've been referring to the defendant in this
 23 case, basically?

24 A. That's what I've assumed, yes, sir.

25 Q. You've not done any calculations with the

118 that if you do?

2 A. I think Mr. Campbell would.

3 Q. Right.

4 Let me move on to your report, to the section
 5 entitled "Corrective Advertising."

6 A. Yes, sir.

7 Q. Have you deleted that from your damages in this
 8 case?

9 A. No, I haven't deleted it. The advertising
 10 component, you asked about before. It's there. I don't
 11 have any additional information with regards to what it
 12 might take to provide corrective advertising. I only had
 13 the information that Mr. Leonard has used, historically,
 14 for his stores.

15 Q. So is it --

16 A. So I have not done anything more than what is
 17 stated on page four.

18 Q. Is it fair to say that as we sit here today,
 19 you don't have an opinion as to what amount might be
 20 needed for corrective advertising?

21 A. That's a correct statement.

22 Q. And would it be fair to say that you're not
 23 aware, as we sit here today, of any false impressions
 24 that have been associated with the alleged improper use
 25 of a trademark?

120 1 assumption that Gary Fox had purchased a franchise
 2 operation at any point in time?

3 A. No, sir.

4 Q. Have we covered all of the, first of all,
 5 calculations that you've done in this case?

6 A. Yes, sir, I believe we have.

7 Q. Have we covered all of the opinions which
 8 you've been asked to give in this matter?

9 A. Yes, sir, I believe we have.

10 Q. And between what you've disclosed in your
 11 report as those things that you've reviewed, as well as
 12 what you've brought with you here today, have we seen all
 13 of those documents upon which you've relied or generated
 14 in this matter?

15 A. Yes, sir. I don't think there's anything else.

16 Q. Are you aware of whether or not you're going to
 17 work on any rebuttal testimony in this matter?

18 A. That's up to Mr. Campbell. We haven't
 19 discussed it.

20 Q. As we sit here today, you haven't discussed any
 21 additional work on the case?

22 A. There's been discussions, but I don't think
 23 I've been asked to do anything additional.

24 Q. Has there been discussions of things you are
 25 considering to do?

EXHIBIT 39

(follows this page)

Team Tires Plus, Ltd.

v.

Tires Plus, Inc.

November 18, 2002

Prepared by:
Oscher  Consulting

UNDERSTANDING

It is our understanding that Team Tires Plus, Ltd. ("Tires Plus" or "the Plaintiff") has filed a lawsuit against Tires Plus, Inc. ("TPI" or "the Defendant") alleging service mark infringement and unfair competition.

Tires Plus is a company engaged in the business of franchising and operating retail tire stores and automobile service centers nationwide. The service mark in question has been in use by the Plaintiff or its predecessor in interest since 1981. It is believed that subsequent to the adoption and use of the service mark, Tires Plus, by the Plaintiff, the Defendant began using the service mark, Tires Plus, in connection with its retail tire store and automobile service business in Albuquerque, New Mexico.

The Defendant has engaged an accounting expert, Mr. Bruce F. Mallot, CPA, who has provided a report and testified that TPI has realized losses in fourteen of the sixteen years from 1986 to 2001. He concludes that the fourteen years of losses should be aggregated against the two years of profits and the result would be an aggregate loss of \$1,122,762. Oscher Consulting, P.A. and Steven S. Oscher, CPA, have been requested by counsel to evaluate Mr. Mallot's conclusions.

BACKGROUND

Steven S. Oscher is a Certified Public Accountant and the Managing Director of Oscher Consulting, P.A. Prior to forming Oscher Consulting, Mr. Oscher was with an international accounting firm where he served as an Audit and Quality Review partner and Director of their Central Florida Litigation Services Department.

Mr. Oscher is a graduate of the University of South Florida and received his BS in Accounting in 1977. Mr. Oscher is a member of the Association of Certified Fraud Examiners and has been accredited as a Certified Fraud Examiner. He has also been accredited by the American Institute of CPA's in the area of Business Valuation. He has worked on numerous engagements involving issues of economic damages.

A copy of Mr. Oscher's curriculum vitae is attached as Exhibit I. A listing of cases in which Mr. Oscher has provided testimony at trial or deposition in the last four years is attached as Exhibit II. Mr. Oscher is compensated at the rate of \$225 per hour.

INFORMATION CONSIDERED

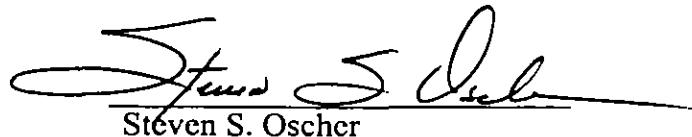
At this time, we are aware that discovery remains open and additional information may be provided. The documents we have obtained and considered are shown at Exhibit III.

FINDINGS AND CONCLUSION

Mr. Mallot testified that he received the financial information utilized in his August 14, 2002 expert report, from TPI's outside accounting firm. His report suggested and his testimony confirmed that he did no independent testing of the financial information to determine whether the financial information presented actually represented the operating results for the business of Tires Plus, Inc.

Mr. Mallot indicated that he relied on conversations with Mr. Leonard as the basis for his conclusions and that, while operating losses in 14 of 16 years did not appear usual, he did nothing independently to specifically analyze and quantify any of his concerns.

At the conclusion of Mr. Mallot's testimony, I suggested of Plaintiff's counsel that additional information should be obtained to properly evaluate the financial information Mr. Mallot utilized in his report. At the present time, the financial information produced, Tires Plus, Inc.'s general ledger for the years 1997-2001 and Mr. Leonard's personal tax returns for the years 1986-2000, have not provided the detail needed to fully evaluate the Defendant's operations and, as a result, it remains difficult to conclude that Tires Plus, Inc. operated unprofitably for fourteen of the prior sixteen years.



Steven S. Oscher

11/18/02

Date

EXHIBIT 40
(follows this page)

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW MEXICO
3

4 TEAM TIRES PLUS, LTD., a
5 Minnesota corporation,

6 Plaintiff(s),
7

8 vs. CASE NO.: CIV-01- 1124 WWE/RLP
9

10 TIRES PLUS, INC., a
11 New Mexico corporation,

12 Defendant(s).
13

14 TELEPHONIC DEPOSITION OF STEVEN S. OSCHER
15 VOLUME II
16

17 PURSUANT TO the notice of taking deposition
18 of STEVEN S. OSCHER, upon oral examination in the
19 above-styled cause, at the instance of Defendant(s),
20 for the purpose of discovery, for use at trial, or
21 both of the foregoing, or for such other purposes as
22 are permitted under the Florida Rules of Civil
23 Procedure and other applicable law, proceedings
24 therefore were held before Kathy Savich, Registered
25 Professional Reporter and Notary Public in and for
 the State of Florida at Large, at Shumaker, Loop &
 Kendrick, 101 East Kennedy Boulevard, Suite 2800,
 Tampa, Florida, on January 23, 2003, commencing at
 9:00 a.m. MST.

1 that; that's correct, sir.

2 Q. And during that time in your life, did you
3 often and commonly prepare financial statements for
4 use in the business world that weren't audited?

5 A. Yes.

6 Q. And you're not suggesting that just because
7 financial statements are not audited that they're
8 necessarily untrustworthy?

9 A. No.

10 Q. In regard to the new information that you
11 received since your last deposition, did you find
12 any information that led you to believe that Don
13 Leonard would have agreed to a franchise operation
14 here in New Mexico from the years 1994 through 2001?

15 A. No, sir.

16 Q. And would you agree that your calculations
17 concerning lost royalties or lost tire sales are
18 based upon the assumption that a franchise agreement
19 would have been entered into?

20 MR. CAMPBELL: Travis, again, this is
21 Phil Campbell. I'm going to impose an
22 objection. You're now seeking to redepose
23 him on his initial reports, findings and
24 conclusions.

25 MR. COLLIER: Well, his position in this

1 have any evidence that Mr. Leonard would have
2 entered into a franchise agreement? That was your
3 opinion then; is that correct?

4 A. I had no evidence, that's correct, sir.

5 Q. All right. And based upon all the review
6 that you've done since that time, you still have no
7 evidence to that effect?

8 A. That's correct, sir.

9 Q. And as we sit here today then, after you
10 reviewed this new information, is it accurate to
11 state that whether or not Mr. Leonard would have
12 entered into a franchise agreement is speculative?

13 A. Yes.

14 Q. I'm sorry, I can't hear you.

15 A. I said yes.

16 Q. Your answer is yes; is that correct?

17 A. That's correct.

18 Q. I can't hear you, Mr. Oscher.

19 A. Yes.

20 Q. Thank you. And would it also be fair to
21 state that given all the new information that you
22 have seen since the last deposition, there is no
23 information there that would indicate that Don
24 Leonard would have purchased any tires from
25 Plaintiff, Team Tires Plus, in the years 1994

1 through 2001; is that correct?

2 A. If they weren't a franchise -- if he wasn't
3 a franchisee, I don't know that he'd have the
4 ability to purchase tires from Team Tires.

5 Q. So whether or not he would have purchased
6 tires from the Plaintiff in the operative time
7 periods is also speculative as we sit here today; is
8 that correct?

9 A. If the presumption is that he would have
10 been a franchisee, then I don't think it's
11 speculative that he would have bought tires. So I
12 am not sure the question you're asking me now, given
13 the assumption that I made that he was acting or
14 would have acted as a franchisee.

15 Q. All right. But you, yourself, have no
16 information that he would have been a franchisee.
17 We have covered that; is that correct?

18 A. That's correct, sir.

19 Q. And therefore, you have no information
20 yourself that he would have purchased tires; is that
21 correct?

22 A. That's correct, sir.

23 Q. So that becomes speculative; is that
24 accurate?

25 A. No, not -- again, not under the initial

1 said that he has not reached any additional
2 opinions or conclusions based upon anything
3 he's been provided other than contained in
4 his rebuttal report. Let's move on.

5 Q. My question to him is: Do you intend, sir,
6 to use any of the documents that we sent to you
7 since your last deposition to put it up in front of
8 the jury and to point out any discrepancies to the
9 jury?

10 A. I don't know.

11 Q. You're not prepared to testify on that
12 today; is that your testimony?

13 A. I am not prepared to answer the question
14 the way it is asked because I don't know what the
15 additional information that I will receive, whether
16 or not, you know, that information that I've looked
17 at so far needs to be further evaluated.

18 Q. So, as we sit here today then, with the
19 information you've been given, you cannot testify
20 one way or the other whether or not Donnie Leonard's
21 financials are inaccurate?

22 A. That's correct.

23 Q. And unless you get any additional
24 information, you won't be able to give that
25 testimony at trial; is that fair also?

EXHIBIT 41

(follows this page)

<i>Team Tires Plus, Ltd.</i>
<i>v.s.</i>
<i>Tires Plus, Inc.</i>
<u>U.S.D.C. No. CIV-01-1124 JP/RLP</u>
ADDENDUM TO
EXPERT WITNESS
REPORT OF
BRUCE F. MALOTT, CPA
<u>November 18, 2002</u>

Consequently, Mr. Oscher used RMA *Annual Statement Studies* to determine an expected profit for Defendant. The *Annual Statement Studies* are published by Risk Management Associates (RMA) and contain financial information submitted to cooperating banks by companies grouped by industry "Standard Industrial Classification."

Although Mr. Oscher was subsequently supplied with additional financial statement information for the Defendant, Mr. Oscher failed to use actual financial statement information as provided by the Defendant in his analysis and provided no substantive reasons or analysis for his failure to use the Defendant's actual financial data. I have read the Defendant's financial statements, and corporate tax returns for the tax years ended December 31, 1986, through December 31, 2000, Mr. Don Leonard's personal income tax returns for the tax years ended December 31, 1986 through December 31, 2000, and leases and notes payable to shareholders of the Defendant and have discussed them with Mr. Donald Leonard and I am unaware of any reason to doubt their accuracy.

Mr. Oscher has chosen to continue to utilize only the Defendant's reported revenue numbers, extrapolating profits using RMA benchmarks. This, however, is not the purpose for which RMA publishes its financial statement studies. RMA states in its Introduction:

RMA does not recommend the Statement Studies figures be considered as absolute norms for a given industry. Rather the figures should be used only as general guidelines and in addition to the other methods of financial analysis.

Mr. Oscher acknowledges that RMA should be used only as a general guideline in his deposition at page 39, lines 10 through 24.

Mr. Oscher's use of the RMA data to extrapolate a profit over the years 1994 to 2001 to TPI is speculative and contradicted by the facts. As noted in my original report dated August 14, 2002, TPI suffered losses for the years in question. It is important to note that for the years ended December 31, 1996 through 1999, and for the seven months ended July 29, 2000 many of Plaintiff's retail stores also consistently suffered losses. Further, of the Plaintiff's stores suffering losses, many did so to a magnitude greater than the losses suffered by the Defendant for those years. Mr. Oscher's contention that the Defendant was or would have been profitable is

EXHIBIT 42

(follows this page)

• RMA recommends that *Statement Studies* data be regarded only as general guidelines and not as absolute industry norms. There are several reasons why the data may not be fully representative of a given industry:

- (1) The financial statements used in the *Statement Studies* are not selected by any random or statistically reliable method. RMA member banks voluntarily submit the raw data they have available each year with no limitation on company size.
- (2) Many companies have varied product lines; however, the *Statement Studies* categorize them by their primary product Standard Industrial Classification (SIC) number only.
- (3) Some of our industry samples are rather small in relation to the total number of firms in a given industry. A relatively small sample can increase the chances that some of our composites do not fully represent an industry.
- (4) There is the chance that an extreme statement can be present in a sample, causing a disproportionate influence on the industry composite. This is particularly true in a relatively small sample.
- (5) Companies within the same industry may differ in their method of operations which in turn can directly influence their financial statements. Since they are included in our sample, too, these statements can significantly affect our composite calculations.
- (6) Other considerations that can result in variations among different companies engaged in the same general line of business are different labor markets; geographical location; different accounting methods; quality of products handled; sources and methods of financing; and terms of sale.

For these reasons, RMA does not recommend the Statement Studies figures be considered as absolute norms for a given industry. Rather the figures should be used only as general guidelines and in addition to the other methods of financial analysis. RMA makes no claim as to the representativeness of the figures printed in this book.